No. 89-913

In The

Supreme Court of the United States

October Term, 1989

ELWIN ETHERIDGE,

Petitioner,

v.

CHARLES S. ANDREWS and
SHELBY S. ANDREWS, his wife,

Respondents.

**On Petition For Writ Of Certiorari To
The Florida Fifth District Court Of Appeal**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether personal, long-arm jurisdiction may be exercised over a nonresident co-employee, (a) who is an officer, agent, and employee of a corporate employer; and (b) who is alleged to have created, in the forum state, by willful and wanton or grossly negligent acts or omissions outside of the forum state, dangerous employment conditions that caused, in the forum state, injury to another employee, notwithstanding that the conduct was carried out whilst in the scope and authority of employment with the corporation.

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CONSTITUTIONAL PROVISION AND FLORIDA STATUTES INVOLVED

U.S. Const. amend. XIV:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Fla. Stat. § 48.193 (1987): Acts subjecting person to jurisdiction of courts of state (Appendix A, p. 1a to this brief).

Fla. Stat. § 440.11(1) (1987): Exclusiveness of liability (Appendix B, p. 4a to this brief).

STATEMENT OF CASE

In accordance with Rules 24.2 and 14.1(g) of the Rules of the Supreme Court of the United States, Respondent adopts the statement of the case set forth in the Petition, with the following key facts – contained in the amended complaint and in the affidavit of Respondent Charles F. Andrews – which are missing from Petitioner's statement of the case.

Petitioner personally knew the type of equipment necessary for the proper and safe completion of Respondent Andrews' job in Florida. Petitioner personally knew the maintenance status of the equipment to be used by Respondent Andrews at the time of the accident.

Before leaving with his crew for the job in Florida, Respondent Andrews personally informed Petitioner, that the electrical equipment to be used had been shorting out and that the wiring was improper. Other employees

attempted to make repairs to the electrical system, but Petitioner personally ordered them to stop and not to complete repairs until after the equipment had been returned from the job in Florida

Likewise, Respondent had previously requested Petitioner to repair an air compressor to be used at the job site in Florida in order to ensure an adequate ventilation system; but Petitioner failed to correct the deficiency. As a result of the inadequate ventilation in the fuel tank and the improperly wired electrical equipment, an explosion occurred in a fuel tank being cleaned by Respondent Andrews and resulted in his severe injuries.

Respondent Andrews sued Petitioner in Florida alleging that, in his individual capacity as a co-employee, he had committed willful and wanton or grossly negligent acts or omissions, out-of-state, that produced a dangerous condition of employment within Florida causing injury to Respondent Andrews.

Liability is predicated under **Fla. Stat.** § 440.11(1) as articulated by the Florida Supreme Court in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987). **Fla. Stat.** § 440.11(1) allows for liability of employees for their gross negligence resulting in death or injury to their fellow employees. The Florida Supreme Court in *Streeter* ruled that an officer, executive, supervisor or other corporate employee is a co-employee for purposes of the statute.

SUMMARY OF ARGUMENT

Petitioner has been sued in Florida, under **Fla. Stat.** § 440.11(1), on charges of conduct (a) of a willful and

wanton or grossly negligent character; (b) resulting in injury to a fellow employee in Florida; and (c) for which he can only be liable if committed by him personally, as a co-employee, in the scope of his employment with the corporate employer. The fact that the conduct occurred outside of Florida does not alter the basis for liability or for long-arm jurisdiction over him. No issue of imputing to him the purely corporate activities of the corporate employer even arises.

The exercise of long-arm jurisdiction over Petitioner, under **Fla. Stat.** § 48.193, is consistent with the standards of the Due Process Clause, because Petitioner reasonably had to have anticipated that conduct such as that with which he is charged would affect working conditions and fellow employees at the job location in Florida; and that the interests of Florida in preventing, and redressing, injuries resulting from unsafe working conditions in Florida, would afford a forum in which Petitioner would be required to defend, and answer, individually for such conduct by him.

ARGUMENT

I. THE FLORIDA APPELLATE COURT'S RULING PROPERLY UPHOLDS LONG-ARM JURISDICTION OVER PETITIONER, PURSUANT TO *FLA. STAT.* § 48.193, BASED ON ALLEGATIONS AND AVERMENTS OF HIS INDIVIDUAL CONDUCT AS A CO-EMPLOYEE.

Petitioner, Elwin Etheridge, is properly subject to the jurisdiction of the Florida courts, under the Florida long-arm statute. He is alleged, as a co-employee, to have

caused by willful and wanton or grossly negligent acts or omissions outside of Florida, unsafe working conditions in Florida and resultant injury to Respondent, Charles Andrews, in Florida.

Not only is this "not a complex case" which "does not involve big names, hundreds of plaintiffs or defendants, or vast sums of money" (Petition at 6); it does not present an issue concerning imputation of corporate minimum contacts to individual officers and employees, for purposes of long-arm jurisdiction and due process considerations.[1]

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[1] The question, whether the conduct of individuals, who are officers, agents, or employees of corporations, and who act within the scope of their employment or agency with the corporation, may subject them to personal, long-arm jurisdiction, has been analyzed by courts and commentators as "the fiduciary shield doctrine." *See, e.g., Davis v. Metro Productions, Inc.*, 885 F.2d 515, 520-22 (9th Cir. 1989) (under fiduciary shield doctrine, person's mere association with corporation that causes injury in forum state not sufficient in itself to permit forum to assert jurisdiction over person; but individual may be subject to personal jurisdiction in forum state as well, where corporation is agent or alter ego of individual, or where conduct and an interest of corporation and individual are identical); *Stuart v. Spademan*, 772 F.2d 1185, 1196-98 (5th Cir. 1985) (fiduciary shield doctrine – that individual's acts within state solely as corporate agent do not create personal jurisdiction over him – does not apply, when individual is alter ego of corporation, or when acts of individual officers or agents are identical with corporation's acts and provide personal liability for harm to third persons); *Holfield v. Power Chemical Co., Inc.*, 382 F.Supp. 388, 394 (D. Md. 1974) (individual defendant subject to long-arm jurisdiction because corporation, acting by him, was his alter ego); *Lawson v. Baltimore Paint & Chemical*

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This is not an extraordinary case of constitutional magnitude, justifying certiorari review by this Court. Petitioner is not a simple, passive officer of a corporation who finds himself haled into the Florida courts based solely on conduct of the corporation alone.

In accordance with the public policy of the State of Florida, as enacted by the Florida Legislature in **Fla. Stat.** § 440.11, and as articulated by the Supreme Court of Florida in *Streeter v. Sullivan*, 509 So.2d at 270-72, Petitioner Etheridge has been sued in the Florida courts, on allegations that, by willful and wanton or grossly negligent acts or omissions outside of the State of Florida, as a co-employee, he created a dangerous employment condition within the State of Florida which caused injury in Florida to a co-employee. To be held responsible for those injuries is not to impute liability to him, based solely on conduct of the corporation.

Responsibility is attributed to him individually, as a co-employee, for such conduct, despite the fact that it occurred as well within the scope and authority of his employment and agency with the corporate employer, Etheridge Petroleum & Electric, Inc.

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Corp., 298 F.Supp. 373, 379-80 (D. Md. 1969) (allegations of amended complaint went beyond mere fact that individual defendants acted as directors and officers of corporation: active conduct on behalf of corporation, for individual as well as corporate benefit, causing tortious injury in Maryland, subjected them to long-arm jurisdiction by Maryland courts). *See generally*, Sponsler, *Jurisdiction Over the Corporate Agent: the Fiduciary Shield*, 35 Wash. & Lee L. Rev. 349 (1978).

For purposes of personal jurisdiction, this is not an attempt to impute to Petitioner neutral conduct on behalf of the corporation, which could have been carried out only as the acts of the corporation.[2] Neither is it an attempt to impute to him the minimum contacts and purposeful activities of the corporation alone.

Instead, he may be required to respond in the Florida courts to charges that willful and wanton or grossly negligent acts or omissions that he took, outside of the State of Florida, as a co-employee, produced a dangerous condition in Florida, resulting in injuries in Florida to a fellow employee, notwithstanding that such acts or omissions were also the acts of the corporate employer. The allegations of the amended complaint and the averments of the affidavits establish, prima facie[3], that Petitioner has

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[2] To be sure, if Petitioner had been sued solely on account of acts "that could have been committed only by the corporation," *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 428 So.2d 348, 350 (Fla. 3d D.C.A. 1983), those acts could not be attributed to Petitioner for purposes of the necessary minimal contacts on which to predicate personal jurisdiction over him. *Stuart v. Spademan*, 772 F.2d at 1197 & n.11. "[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13, 104 S.Ct. 1473, 1482 n.13, 79 L.Ed.2d 790 (1984).

[3] A plaintiff, who bears the burden of establishing personal jurisdiction over defendant, *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, 57 S.Ct. 197, 201, 81 L.Ed. 183 (1936); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 384 (5th Cir. 1989); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1270 (5th Cir. 1983); *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977), meets that burden by presenting a prima facie case for personal jurisdiction. *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d at 384; *DeMelo v. Toche Marine,*

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been so sued in the Florida courts. These facts satisfy several conditions of the Florida long-arm statute,

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Inc., 711 F.2d at 1270; *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1285.

Where (as in the case at hand) the trial court considers only written materials, affidavits, depositions, or other discovery materials – without holding an evidentiary hearing – "it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss," *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1285; and "all conflicts in the facts alleged in opposing affidavits 'must be resolved in [the] plaintiff[s'] favor for purposes of determining whether a prima facie case for *in personam* jurisdiction has been established.' " *DeMelo v. Toche Marine, Inc.*, 711 F.2d at 1271, *quoting United States Ry. Equipment Co. v. Port Huron & Detroit R.R. Co.*, 495 F.2d 1127, 1128 (7th Cir. 1974). *Accord Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d at 384; *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1285; *O'Hare Int'l. Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971) (affidavits filed pursuant to Rule 12(d) motions to dismiss presented contradictory factual allegations from which to decide jurisdictional issues; and conflicting statements required assuming facts related in plaintiff's affidavits and complaint to be true).

This does not foreclose the possibility of a contrary conclusion ultimately, should the factual averments of the plaintiff not be supported, or be refuted, by the evidence on the merits. *See DeMelo v. Touche Marine, Inc.*, 711 F.2d at 1271 n.12 (eventually plaintiff must establish jurisdiction by preponderance of evidence at pretrial evidentiary hearing or at trial); *Data Disc, Inc. v. Systems Technology Assocs, Inc.*, 557 F.2d at 1280 n.2 (plaintiff must still prove jurisdictional facts at trial by preponderance of evidence); *Thompson v. King*, 523 F.Supp. 180, 184 n.1 (M.D. Fla. 1981) (by end of trial plaintiff must prove by preponderance of evidence sufficient facts supporting jurisdiction).

Fla. Stat. § 48.193.[4]

To say that his actions were merely or only those of the corporation ignores that, under Florida law, individuals who are corporate officers, agents, and employees,

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[4] Although pleading the language of the Florida long-arm statute alone is sufficient to satisfy Florida procedural law, Fla. R. Civ. P. 1.070(i), it appears that it is not necessary to plead either specific statutory language or provisions, so long as the factual allegations and averments correspond to conditions of the long-arm statute for asserting *in personam* jurisdiction, sufficiently to inform and give notice to the defendant of the basis for which he is being required to respond in the Florida courts. *Woods v. Jorgensen*, 522 So.2d 935, 936 n.1 (Fla. 1st D.C.A. 1988); *Carlson Design & Associates, Inc. v. Anderson Athletic Club, Inc.*, 485 So.2d 871, 872 (Fla. 1st D.C.A.), *rev. dismissed*, 491 So.2d 278 (Fla. 1986). In the case at hand, the Florida trial and appellate courts appear to have been satisfied that the factual averments correspond to statutory conditions for long-arm jurisdiction, to furnish notice to Petitioner.

In any event, whether, and to what extent, the exact language and provisions of the long-arm statute must be pled, in addition to corresponding factual allegations and averments, are exclusively matters of state law, which do not present an issue for review by this Court, and with which it need not be concerned.

Absent an inconsistency with federal law, state law procedural and evidentiary rules of law do not present a federal question within this Court's power to review. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945) (Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudged federal rights . . . [w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion".); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128-29, 65 S.Ct. 1475, 1480-81, 89 L.Ed. 2092 (1945) (where state court

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and who commit in Florida individual tortious acts[5] within the scope of their employment and agency –

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held that parties by their pleadings had conceded that Federal Communications Commission had no jurisdiction over controversy, Supreme Court could not determine correctness of such holding on certiorari, in that waiver of issue by failure to raise question in pleadings is matter of state law); *Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977) (failure to follow Florida's procedural rule by not making timely objection to admission of inculpatory statements, under Florida's contemporaneous objection rule, amounted to independent and adequate state ground, preventing direct review in Supreme Court); *Henry v. Mississippi*, 379 U.S. 443, 446-48, 85 S.Ct. 564, 567, 13 L.Ed.2d 408 (1965) (same, Mississippi rule); *Prince v. Massachusetts*, 321 U.S. 158, 163, 64 S.Ct. 438, 440-41, 88 L.Ed. 645 (1944) (question whether conduct of minor amounted to a "sale," "offer to sell," or "work", prohibited under state statute, was decided at state court level, and not open to review by Supreme Court); *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32, 35, 65 S.Ct. 9, 10, 89 L.Ed. 25 (1944) (whether or not Kansas statute covered facts at issue was matter solely for determination of Kansas, in suit involving issue of whether statute violated federal due process or equal protection under Fourteenth Amendment).

[5] For purposes of the Florida long-arm statute, **Fla. Stat.** § 48.193, a tort occurs where the injury occurs: "the place of *injury* is the location of the tortious act for purposes of long-arm jurisdiction under Florida's statute." *Lee B. Stern & Co., Ltd. v. Green*, 398 So.2d 918, 919 (Fla. 3d D.C.A. 1981) (emphasis in original). *Accord Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107, 1109 (5th Cir. 1976) (Florida long-arm statute reaches "situation where a foreign tortious act caused injury in Florida"); *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1212-13 (5th Cir. 1975) (Florida long-arm statute to be read broadly to include situation in which foreign tortious act causes injury within Florida); *International Harvester Co. v.*

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regardless of whether they are residents or non-residents[6] – are held to respond and stand accountable in the Florida courts.

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Mann, 460 So.2d 580, 581 (Fla. 1st D.C.A. 1984) (commission of tort for purposes of establishing long-arm jurisdiction does not require physical entry into state, but merely that "place of *injury* be within Florida" (emphasis in original)); *Carida v. Holy Cross Hospital, Inc.*, 424 So.2d 849, 851 (Fla. 4th D.C.A. 1983) (no distinction between physical tort committed in state, and tort committed by sending false statements into state, from out-of-state).

[6] If Petitioner were a resident of Florida, and an officer and employee of a Florida corporation, and committed a tortious act within the scope of his employment with the corporation, he could be sued in the Florida courts, and held to respond accountably, by a third party. *White-Wilson Medical Center v. Dayta Consultants, Inc.*, 486 So.2d 659, 661 (Fla. 1st D.C.A. 1986); *Derf Cattle Co. v. Colpac Int'l., Inc.*, 463 So.2d 430 (Fla. 3d D.C.A. 1985); *Littman v. Commercial Bank & Trust Co.*, 425 So.2d 636, 640 (Fla. 3d D.C.A. 1983); *Naranja Lakes Condominium No. One, Inc. v. Rizzo*, 422 So.2d 1080 (Fla. 3d D.C.A. 1982); *Orlovsky v. Solid Surf, Inc.*, 405 So.2d 1363, 1364 (Fla. 4th D.C.A. 1981); *Adams v. Brickell Townhouse, Inc.*, 388 So.2d 1279, 1280 (Fla. 3d D.C.A. 1980); *Dade Roofing & Insulation Corp. v. Torres*, 369 So.2d 98, 99 (Fla. 3d D.C.A. 1979). *Cf. American Credit Card Telephone Co. v. National Pay Telephone Corp.*, 504 So.2d 486, 488, 490 (Fla. 1st D.C.A. 1987) (complaint was devoid of allegations that corporate officers individually involved in tortious acts or derelictions of duty).

By the same token, if Petitioner lived (were domiciled or resided) in Florida, he would be subject to suit, by a co-employee, in Florida, for liability on account of conduct as a co-employee that affects other employees in Florida (pursuant to **Fla. Stat.** § 440.11), notwithstanding the fact that he is also

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In fact, under Florida law, neither the basis for liability, nor the basis for long-arm personal jurisdiction, rests – or can rest – on imputing to Petitioner mere neutral conduct by the corporate employer. A co-employee is liable under **Fla. Stat.** § 440.11(1) only if he has committed willful and wanton or grossly negligent acts – acts which are necessarily those of the individual co-employee. The only basis for liability against Petitioner under **Fla. Stat.** § 440.11(1), is the assertion that his own willful and wanton or grossly negligent acts, as a co-employee (not the mere acts of the corporate employer) caused injury to Respondent in Florida.

> [T]he plain language of sections 440.01 and 440.11(1) precludes any further explanation of legislative intent. These statutes unambiguously impose liability on all employees for their gross negligence resulting in death or injury to their fellow employees. This imposition of liability is blind to corporate status. Nowhere does section 440.11(1) impose upon injured employees a requirement to show that the fellow employee has committed some affirmative act going beyond the scope of the employer's nondelegable duty to provide a safe place to work. We

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an officer of the corporation through which it acts. *Streeter v. Sullivan*, 509 So.2d at 270-72.

If Petitioner, although residing outside of Florida, and although an officer or agent, as well as an employee of a foreign (non-Florida) corporation, committed an individual tortious act, in Florida, within the scope of his employment, he could still be held to stand accountable, in the Florida courts, by a third party. *Lee B. Stern & Co., Ltd. v. Green*, 398 So.2d at 920; *Odell v. Signer*, 169 So.2d 851, 853-54 (Fla. 3d D.C.A. 1964), *cert. discharged*, 176 So.2d 94 (Fla. 1965). *See Stuart v. Spademan*, 772 F.2d at 1197.

> are not inclined to read such a requirement into the statute when it is plainly not there.
>
> The affirmative act doctrine has its roots in cases interpreting section 440.11(1) before it was amended in 1978. Those cases did not have the benefit of the legislature's statement expressly imposing liability on grossly negligent employees who injure other employees.

Streeter v. Sullivan, 509 So.2d at 271. That same conduct by Petitioner, as a non-resident co-employee, is the basis for long-arm jurisdiction over him under **Fla. Stat.** § 48.193. The same individual acts are the basis for both substantive liability and personal jurisdiction.

II. THE FLORIDA COURTS' EXERCISE OF PERSONAL JURISDICTION OVER PETITIONER ETHERIDGE, BY THE FLORIDA LONG-ARM STATUTE, IS CONSISTENT WITH THE DUE PROCESS CLAUSE.

Given that the out-of-state conduct with which a nonresident defendant is charged satisfies conditions of the State's long-arm statute, the Due Process Clause marks the limit on the exercise of State jurisdiction over a nonresident. *Asahi Metal Indus. Co., Ltd. v. Superior Court of Calif., Solano County*, 480 U.S. 102, 108, 107 S.Ct. 1026, 1031, 94 L.Ed.2d 92 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980); *Kulko v. Superior Court of Calif.*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222, 78 S.Ct. 199, 200, 2 L.Ed.2d 223 (1957).

To determine that boundary for exercising long-arm jurisdiction consistent with the Due Process Clause, the prerequisite standard ("constitutional touchstone") is that

the nonresident defendant have some purposeful connection ("minimum contacts" or "affiliating circumstances") with the forum state, to make it reasonable and fair, and "not offend traditional notions of fair play and substantial justice," for him to defend in the courts of that state. *Asahi Metal Indus. Co., Ltd. v. Superior Court of Calif., Solano County*, 480 U.S. at 113, 107 S.Ct. at 1033; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 294, 100 S.Ct. at 565; *Rush v. Savchuk*, 444 U.S. 320, 327, 100 S.Ct. 571, 577, 62 L.Ed.2d 516 (1980); *Kulko v. Superior Court of Calif.*, 436 U.S. at 92, 98 S.Ct. at 1696-97; *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. at 222-23, 78 S.Ct. at 200-01.

To judge minimum contacts, the courts properly focus on the relationship amongst the defendant, the forum, and the litigation. *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 775, 104 S.Ct. at 1478.

For purposes of deciding whether the case at hand warrants certiorari review, this Court might simply determine whether this case is akin to *Rush v. Savchuk*, (plaintiff, injured in automobile accident in Indiana, and covered by insurance policy issued to him in Indiana, moved to Minnesota and sued insurer there); *World-Wide Volkswagen Corp. v. Woodson*, (plaintiffs who bought automobile in New York, drove it to new home in Arizona, had accident in Oklahoma, and sued defendants in Oklahoma courts); *Kulko v. Superior Court of Calif.*, (father, whose divorce decree in New York gave him custody of daughter, sued by mother concerning conditions of

decree in California, where she lived and where daughter moved to be with her); *Hanson v. Denckla*, (testamentary legatees in Florida sued trustee and beneficiaries of trusts, residents in Delaware, in Florida court concerning assets of the trusts); or more like *Keeton v. Hustler Magazine, Inc.*, and *Calder v. Jones, supra.*

Keeton v. Hustler Magazine, Inc., presented a New York resident suing, in the New Hampshire courts, a corporate citizen of Ohio and California (along with individuals who were not citizens or residents of New Hampshire), for libel damages. The only contacts by the defendants with New Hampshire were the monthly sale of copies of the magazine in that state. 465 U.S. at 772, 104 S.Ct. at 1477. This Court rejected the corporate publisher's contention that injury from a single publication was so insufficient a relationship or contact with New Hampshire as to make the exercise of long-arm personal jurisdiction unfair. *Id.* at 773-75, 104 S.Ct. at 1477-78. The Court repeated the tripartite relationship to be examined "[i]n judging minimum contacts": "the relationship among the defendants, the forum, and the litigation." *Id.* at 775, 104 S.Ct. at 1478.

The corporation's contact by "regular circulation of magazines in the forum State [New Hampshire was] sufficient to support an assertion of jurisdiction." *Id.* at 773. New Hampshire's interest in redressing injuries that actually occur within the state, in preventing in-state libel, and providing a forum cooperatively with other states for litigating libel issues and damages, was a substantial one, that justified requiring the defendants to answer in the New Hampshire courts. *Id.* at 776-78, 104 S.Ct. at 1479-80.

The relationship of the litigation, to the defendant's contact with New Hampshire, and to New Hampshire's interests, was "sufficient to support jurisdiction when the cause of action [arose] out of the very activity being conducted, in part, in New Hampshire." *Id.* at 780, 104 S.Ct. at 1481.

Concerning the individual defendants, the Court noted that it did "not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants," because "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." *Id.* at 1781 n.13, 104 S.Ct. at 1482 n.13. At the same time, the Court reiterated its rejection "that employees who act in their official capacity are somehow shielded from suit in their individual capacity." *Id.*

Calder v. Jones (decided along with *Keeton v. Hustler Magazine, Inc.*) presented the additional question of whether the nonresident, individual defendants could be required to defend (along with their nonresident corporate employer) in California against charges of libel damage to the plaintiff in California. "[L]ikening themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California," the individual defendants contended that the effects in California, of their activities in Florida, were so "fortuitous," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295, 100 S.Ct. at 566, and "adventitious," *Rush v. Savchuk*, 444 U.S. at 329, 100 S.Ct. at 577, as to be without purposeful intent.

This Court rejected the claims of the individual defendants that, because they had made no visits to California[7], and the only act in California was the injurious effect of libel damage to the plaintiff, resulting from actions "performed outside the State," *id.* at 787, 104 S.Ct. at 1485, the individual defendants could not be deemed responsible for the corporate employer's circulation of the libelous article in California. *Id.* at 789, 104 S.Ct. at 1487.

Noting that the individual defendants had been charged, not "with mere untargeted negligence," but with tortious actions "expressly aimed at California," the Court held that it was reasonable and fair to expect them to anticipate being called upon to answer for their actions in the California courts. *Id.* at 789-90, 104 S.Ct. at 1487. While it was "correct that their contacts with California [were] not to be judged according to their [corporate] employer's activities there," at the same time, they were not immune from suit or liability because their conduct had been carried out as employees of the corporate employer. *Id.* at 790, 104 S.Ct. at 1487.

> On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually.

Id.

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[7] The Court gave no consideration to the disputed factual questions concerning trips, investigative activities, and telephone calls to California by one of the individual defendants. *Id.* at 785 n.4, 787 n.6, 104 S.Ct. at 1485 nn.4, 6.

The question presented by the instant Petition is whether, on the facts alleged and averred, it is reasonable to expect that Petitioner knew, or should have known, that he would be held to appear in the Florida courts and answer for injuries to fellow employees in Florida, caused by his out-of-state conduct.

A. RELATIONSHIP OF PETITIONER TO FLORIDA: NATURE AND QUALITY OF CONTACTS.

Personal jurisdiction is not "avoided merely because the defendant did not *physically* enter the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 476, 105 S.Ct. at 2184 (emphasis in original). It is "an inescapable fact of modern commercial life" that business and employment activities are purposefully carried on in other states without the physical presence of individual actors responsible for the conduct. *Id.*

Additionally, the character of the conduct, the quality and nature of the activity, within the forum state may be deemed to have been sufficiently purposeful by the nonresident actor, so as to invoke the benefit and protection of the State, and its personal jurisdiction over him. *International Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945). *See Kulko v. Superior Court of Calif.*, 436 U.S. at 92, 98, 98 S.Ct. at 1697, 1700; *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. at 1240.

A single purposeful act by a nonresident, within the forum State, has been upheld as constitutionally adequate for the exercise of long-arm personal jurisdiction. *See McGee v. International Life Ins. Co.*, 355 U.S. at 221, 223, 78 S.Ct. at 200-01 (single breach of insurance contract in

California by a nonresident insurer sufficient for long-arm jurisdiction). *Cf. Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1, 3, 15 L.Ed.2d 39, 43 (1965) (Goldberg, J. in chambers) (commission of tort in New York, by out-of-state conduct, sufficient for *in personam* jurisdiction under New York long-arm statute).[8]

In the case at hand, Petitioner Etheridge is "not charged with mere untargeted negligence." *Calder v. Jones*, 465 U.S. at 789, 104 S.Ct. at 1487. He is asserted to have made deliberate decisions affecting conditions of employment and safety of equipment to be used by a fellow employee, whom he knew was being sent into Florida to do the work, with that equipment and in those conditions.[9]

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[8] The Florida courts have similarly held that applying the Florida long-arm statute for personal jurisdiction over a non-resident defendant, based on "a single isolated transaction[,] . . . does not necessarily offend due process." *Lacy v. Force V Corp.*, 403 So.2d 1050, 1054, 1056 (Fla. 1st D.C.A. 1981) (single breach of contract to be performed in Florida). *Accord Godfrey v. Neumann*, 373 So.2d 920, 922 (Fla. 1979) ("single isolated . . . tortious act"); *A.J. Sackett & Sons Co. v. Frey*, 462 So.2d 98, 99 (Fla. 2d D.C.A. 1985) ("nonresident manufacturer's single sale of a product in Florida"); *Pennington Grain & Seed, Inc. v. Murrow Bros. Seed Co., Inc.*, 400 So.2d 157, 158-59 (Fla. 1st D.C.A. 1981) (single delivery of soybean seed to Florida).

[9] Petitioner's statements (Petition at 16, 17, 18) concerning the absence ("nonexistent nature") of contact with Florida can only be sustained on the belief – already rejected by this Court, *Calder v. Jones*, 465 U.S. at 790, 104 S.Ct. at 1487 – that he is immune from suit and liability because his acts were also the acts of the corporate employer within the scope of whose employment he acted.

This is not a casual, fortuitous, or random occurrence. The circumstances of Respondent's employment, and of the condition of the materials and equipment to be used by him, were known and intended by Petitioner to take place in Florida.

It is incredible that Petitioner should compare himself (Petition at 18) to a corporate decision-maker for a company like Asahi Metal, in *Asahi Metal Indus. Co. v. Superior Court of Calif., Solano County, supra.* Since, in that case, the corporation, Asahi Metal, had no activities or contact with California, *a fortiori* its president, "in his role as corporate decision-maker," could have had no such contacts.

In contrast, Petitioner concedes that "[t]here is little doubt that the corporat[e employer] would be subject to the jurisdiction of the Florida courts" in the case at hand (Petition at 17). Since the allegations and averments of the Amended Complaint and affidavits ascribe flagrant individual conduct to Petitioner, as a co-employee, within the course of his employment, the only – and altogether different – question here is whether he is immune from suit and liability in his individual capacity, because the conduct was also carried out on behalf of the corporation.

Florida has already ruled that he is not immune from liability, *Streeter v. Sullivan, supra;* and this Court has "reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. at 781 n.13, 104 S.Ct. at 1482 n.13. Individuals' "status as employees does not somehow insulate them from

[long-arm, personal] jurisdiction." *Calder v. Jones*, 465 U.S. at 790, 104 S.Ct. at 1487.

B. RELATIONSHIP OF FLORIDA'S INTEREST TO PETITIONER'S CONDUCT AND TO THE LITIGATION.

Florida's interest in preventing the creation or allowance of dangerous conditions of employment in the State, resulting in injuries to employees in Florida, is a legitimate justification for holding accountable co-employees – regardless of their residence – whose willful and wanton or grossly negligent acts or omissions create the unsafe working conditions. This interest is neither unreasonable, nor an unfair surprise. Any co-employee – whether a resident or not – who offends that interest should reasonably anticipate being haled into court in Florida.

Additionally, Florida has a "significant interest in redressing injuries that actually occur within the State," which it properly "may also extend . . . to a nonresident." *Keeton v. Hustler Magazine, Inc.*, 456 U.S. at 776-77, 104 S.Ct. at 1479. *See Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So.2d 1305, 1313 (Fla. 1981) (Florida, as place of injury, has interest in litigation to assert jurisdiction over nonresident manufacturer).

C. RELATIONSHIP OF PETITIONER TO LITIGATION.

The fact that Mississippi may not, but Florida law and the Florida courts do, offer Respondent a remedy for

injuries that he sustained from unsafe employment conditions, alleged to have been caused by flagrant conduct on the part of Petitioner, is no different than the libel-plaintiff's "successful search for a State with a lengthy statute of limitations," in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 779, 104 S.Ct. at 1480; and it is precisely the situation to which this Court referred in upholding "the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules." *Id.*

In short, from the relationship amongst Petitioner, Florida, and this litigation, there is nothing unfair, unreasonable, or unanticipated about Petitioner being required to answer, in Florida, for deliberate, egregious conduct that he knew would affect the materials and conditions of employment to be used by Respondent in Florida, and from which Respondent's injuries in Florida are alleged to have resulted.

CONCLUSION

The allegations and averments in the case at hand establish, prima facie, that Petitioner, a resident of Mississippi, personally committed, out-of-state, while in the course of his employment as a co-employee of the corporate employer, flagrant conduct that he knew would affect the safety of working conditions in Florida, and which caused injury to a fellow employee in Florida. Under Florida law, **Fla. Stat.** § 440.11(1), he could only be liable based on charges that such conduct was committed by him individually.

To answer such charges, Petitioner is fairly and reasonably subject to *in personam* jurisdiction in the Florida courts, under the Florida long-arm statute, **Fla. Stat.** § 48.193, and consistent with the Due Process Clause. No imputation to Petitioner of purely corporate conduct is at stake; and his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Florida Statutes § 48.193 (1987):

Acts subjecting person to jurisdiction of courts of state.

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, or possessing any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any

other manner now or hereinafter provided by law.

APPENDIX B

Florida Statutes § 440.11(1) (1987):

Exclusiveness of liability.

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee. The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the

employer's business but they are assigned primarily to unrelated works within private or public employment.
